INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument	5
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

Brabham v. State of Mississippi, 96 F.2d 210 (1h Ct.) ---------- 8,9

Dorin v. Equitable Life, 382 F.2d 73 (7th Cir.) ---------- 7

Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Ct.) ---------- 7

Gibbs v. United Mine Workers of America, 343 F.2d 609 (6th Ct.) ---------- 7

Gulf Coast v. F.R. Hoar, 370 F.2d 746 (5th Ct.) ---------- 7

Minneapolis, St. Paul and Sault Sainte Marie Railway Company v. Moquin, 283 US 520 51 S.Ct. 501, 75 L.Ed. 1243 ---------- 5,6,9

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1974

No. A-401

PHILIP A. CALABRESE, individually and as a Councilman and Mayor of Sand City, and FRANK ZABROWSKI, individually and as Chief of Police of Sand City, California,

Petitioners,

vs.

PRESALEAN AVERY, personal representative of BRADY AVERY, deceased, and MELVIN WILLIAMS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Memorandum of Decision of the District Court was dated October 13, 1972 and filed on October 15, 1972 (Pet. App. I-XVIII). The Opinion of the Court of Appeals is unreported (Pet. App. XIX-XXIII). Its order denying the*

**Refers to Appendix attached to Petition for a Writ of Certiorari.*

Petition for Rehearing and rejecting the suggestion for rehearing en banc is similarly unreported (Pet. App. XXIV-XXV). A further unreported clarifying order appears as (Pet. App. XXVI-XXVII).

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1974. The two additional orders were entered on August 12 and August 26, 1974. Petition for Certiorari was dated November 7, 1974 invoking the jurisdiction of this Court under 28 USCA § 1254 (1). By order of Mr. Justice Douglas the time of filing a Cross-Petition for a Writ of Certiorari was extended to and including January 8, 1975. This Opposition is timely filed.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in granting a conditional new trial alternative to a substantial remittitur.

2. Whether the Court of Appeals was correct in granting a new trial conditional on a remittitur in consideration of the circumstances that "Mr. Avery is now deceased and his testimony may not be fully available at any new trial."

STATEMENT

For the purpose of this Brief in Opposition the restitution as contained in the Memorandum of the Court of Appeals is adopted. There it is stated:

> *"Plaintiffs-appellants, owners and operators of A & W Auto Repair Shop, brought this civil rights action for damages and injunctive relief against the defendants-appellees, the Mayor, Chief of Police and members of the Town Council of Sand City, California, in their individual and official capacities. The complaint alleged, inter alia, that the defendants had conspired to harass the plaintiffs by passing a city ordinance which prohibited parking in front of the repair shop in order to drive them out of business and out of the city because of their race. 28 U.S.C. § 1343. After trial to a jury, the plaintiffs were awarded damages against all six of the defendants, $32,000.00 as compensatory damages, and $10,000.00 as punitive damages.*
>
> *"The verdict was filed on November 8, 1971 and judgment on the verdict was entered on November 11, 1971. The defendants mailed their 'Notice of Motion and Motion for New Trial' on November 19, 1971, which was*

filed with the district court on November 22, 1971, asserting as grounds therefor (a) misconduct of parties, counsel and jurors, (b) that the verdict was against the weight of the evidence and (c) that the amount of the verdict was unsupported by the evidence.

"On April 26, 1972, the trial court ordered that 'the submission of defendants' timely motion for a new trial on December 13, 1971, is hereby vacated.' By the same order, the court ordered the parties to appear for a hearing on May 22, 1972, for the purpose of considering, under Fed. R. Civ. P. 59 (d), whether a new trial should be granted because of the defendants' official immunity. Following hearing and submission of memoranda, the court on October 16, 1972, granted the defendants' motion for new trial on the ground that plaintiff Avery's conduct on the witness stand might have been prejudicial to the defendants. Additionally, the district court held that the evidence was insufficient to support the verdict against the defendant councilmen, but that it was sufficient as against the Mayor and Chief of Police, and that the evidence was insufficient to support the jury's award of damages, except as concerned the punitive damages against the

Mayor and Chief of Police. The court, properly we think, Scheuer v. Rhodes, _____U.S. _____, 42 U.S.L.W. 4543 (US decided April 17, 1974); Doe v. McMillan, 412 U.S. 306, 318-20 (1973); see also Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); denied the motion for new trial on the grounds of absolute official immunity. Its instructions were in accordance with the law as established in those decisions."

ARGUMENT

The decision of the Court of Appeals as to the conditional granting of a new trial, conditioned on a remittitur is proper. There is no conflict in the decisions nor is there other ground for further review by this Court.

The decision in Minneapolis, St. Paul and Sault Sainte Marie Railway Company v. Moquin, 283 US 520 51 S.Ct. 501, 75 L.Ed. 1243 (May 18, 1931) was cited by Petitioners only in part. They failed to include in the quotation (page 6) the words:

"In actions under the Federal statute."

The statute referred to was the Federal Employee's Liability Act, and the holding, as we read it, applies to cases brought under that Act. So it will appear since this Court in the case of Limick v. Schiedt, 293, US 474, ___S.Ct.___

(January 7, 1935) held to the contrary then Petitioners read the Minneapolis case, supra. In Dimick, supra, Mr. Justice Sutherland speaking for the majority of the Court stated that:

> *"It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken to increase damages..."*

It is further worthy of note that Mr. Justice Stone dissenting (Joined by the Chief Justice and Mr. Justice Brandeis and Mr. Justice Cardozo) did not dissent from the approval of the remittitur and thus decrease damages. They only dissented because they held that damages may be increased and thus avoid a costly new trial.

Petitioners are in error when they state (page 7):

> *"The circuit courts have consistently adhered to this rule".*

i.e., their interpretation of the Minneapolis holding. To the contrary the circuits were willing to examine the holdings of the trial court as to "passion and prejudice".

In Dorin v. Equitable Life, 382 F.2d 73 (7th Cir.) the Court of Appeals upheld the remittitur in lieu of a new trial stating:

> *"We do not regard the judge's use of the term 'passion and prejudice' as carrying the broad meaning which Equitable would attribute to it."*

In Gulf Coast v. F.R. Hoar, 370 F.2d 746 (5th Ct) the Court of Appeals disagreed with appellant's contention that because a remittitur was ordered by the trial court that therefore there was prejudice.

In Gibbs v. United Mine Workers of America, 343 F.2d 609 (6th Ct.) the Court of Appeals upheld the remittitur by holding that:

> *"This finding (of the trial court) distinguishes this case from the cases cited above where the trial judge had found the order to be the product of passion, and moves it into the traditional area where a remittitur may be employed to avoid an excessive verdict without resort to a new trial."*

In Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Ct.) the Court of Appeals reversed the refusal to grant a new trial, because it found that the verdict of the jury was not above suspicion, as it ought to be.

Brabham v. State of Mississippi, 96 F.2d 210 (5th Ct.) was a suit against the Sheriff and his deputies for assault upon a minor. Damages in the amount of $15,000.00 were awarded by the jury. The amount was to be grossly excessive and the trial court ordered a conditional new trial unless the plaintiffs remits $10,000.00 which he did.

The Court of Appeals disapproval of the remittitur by holding:

> *"...while mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice, however natural the resentment which arouses it, may not be so cured."*

The Court of Appeals found the verdict to be the result of passion and prejudice, holding:

> *"The District Judge felt as the jury did, and as we do, the outrageousness of Vennado's conduct of, as the jury evidently believed, the circumstances of the arrest were as plaintiff's evidence declared them to be. He regretted, as we do, that the jury in considering the damages appropriate to be awarded was carried away by that sense of that outrage. He thought a remittitur would restore to the verdict the cool justice that it lacked."*

In the Brabham case, supra, "cool justice" prevailed and thus the plaintiff who was "so outrageously wronged" may try again. "Cool justice" (whatever that may be) also prevails as to the defendants who acted so outrageously but go scot free, unless the plaintiff musters the courage to seek "cool justice" again.

If the holding in Brabham, supra, stands for the proposition as it appears, a defendant is always entitled to a new trial, because if he acted "outrageously" then the verdict is the result of prejudice. On the other hand, if he did not act too outrageously and the jury returned a verdict for the plaintiff, such verdict must be, in nature of the things expressed by Brabham, - the result of prejudice.

Respondents submit that the Mimeapolis case, supra, cannot be read as giving birth to such a progeny.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: December 31, 1974.

Respectfully submitted,

FRANCIS HEISLER
Counsel for Respondents